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# **Equal Employment Opportunity Complaint Process**

## **A Handbook for Federal Highway Administration Management Officials**



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# INTRODUCTION

Equal Employment Opportunity (EEO) is the law. It is the policy of the Government of the United States to provide equal opportunity in Federal employment and to prohibit discrimination in employment based on race, color, religion, sex, national origin, age, disability, retaliation, or sexual orientation.

This Handbook is designed to provide Federal Highway Administration (FHWA) management officials<sup>1</sup> an overview of the EEO complaint process. The Handbook provides information on the informal process which includes EEO counseling and an offer of mediation; and the formal process which may include an investigation, a hearing before an Administrative Judge, or the issuance of a Final Agency Decision. The Handbook is intended to be an easy reference guide for understanding the EEO complaint process and management officials' responsibilities throughout the process.

The FHWA promotes EEO for all individuals and will not tolerate any form of discrimination in the workplace. The FHWA takes seriously its responsibility to prevent discrimination by removing any barriers that may limit opportunities. Every effort must be made by management officials to ensure that this commitment is reflected in all of the actions and policies of the organization. However, if employees of the FHWA or applicants for employment with the FHWA believe that this commitment is not being met, they may seek guidance and assistance through the EEO complaint process.

The FHWA is committed to maintaining an employment environment that is absolutely **FREE** of discrimination. As an employee, applicant for employment with the FHWA, or former employee, individuals have the right to avail themselves of the EEO complaint process without fear of retaliation.

All the information contained in this Handbook is derived from the Equal Employment Opportunity Commissions' (EEOC) Management Directive-110 and the EEOC's regulation at 29 Code of Federal Regulation (CFR) Part 1614.

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<sup>1</sup> The term "management official" refers to any staff member who serves in a supervisory capacity and is responsible for assignment of work, performance appraisals, issuing awards, disciplinary actions, etc.

# DEFINITIONS

**Administrative Judge** – An EEOC Administrative Judge who has full responsibility for the adjudication of complaints.

**Agency** – In this context refers to U.S. Department of Transportation.

**Aggrieved Person** – A person who believes he/she has been discriminated against and participates in the EEO counseling pre-complaint process.

**Alternative Dispute Resolution (ADR)** – A term used to describe a variety of approaches to resolving conflict rather than traditional adjudicatory methods or adversarial methods.

**Anonymity** – To not be named or identified.

**Complainant** – A person who files a formal EEO complaint.

**Departmental Office of Civil Rights (DOCR)** – The Office within the Department of Transportation responsible for processing formal EEO complaints.

**EEO Counseling** – The required first step in the EEO pre-complaint process.

**EEO Counselor** – An employee who is assigned the collateral duty of providing EEO counseling to Aggrieved Persons.

**Equal Employment Opportunity Commission (EEOC)** – The Federal Agency responsible for administering the EEO complaint process in the Federal Government. The EEOC provides all of the rules, regulations, and procedures for administering the EEO program.

**EEO Investigator** – A person designated and authorized to conduct inquiries into claims raised in EEO complaints.

**Final Agency Decision** – The DOCR's final decision consisting of findings on the merits of each claim in complaints.

**Formal Complaint** – A written document which outlines the basis(es) and claim(s) in an employment discrimination matter.

**Mediation** – The process by which a neutral person helps individuals involved in a dispute reach a mutual agreeable resolution.

**Merit Systems Protection Board (MSPB)** – The MSPB is a forum in which Federal employees may appeal an adverse personnel action, such as removal, reduction, suspension, whistle-blower reprisal or other detrimental actions. The MSPB generally acts after a final decision has been rendered by an agency more directly involved with the matter.

**Relief** – Provisions for resolving the complaint.

**Settlement Agreement** – A formal, signed document between the parties that details the provisions for resolving the EEO matter.

# CHAPTER 1

## AGENCY AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) AUTHORITY AND RESPONSIBILITY

### 1.1 EEOC

The EEOC is authorized to issue rules, regulations, orders, and instructions pursuant to the following:

#### 1. Title VII of the Civil Rights Act of 1964, as amended (Title VII)

Title VII prohibits discrimination based on race, color, religion, sex, and national origin. It also prohibits reprisal or retaliation for participating in the discrimination complaint process or for opposing any employment practice that the individual reasonably and in good faith believes violates Title VII.

#### 2. Rehabilitation Act of 1973, as amended

The Rehabilitation Act prohibits discrimination on the basis of mental and physical disabilities, as well as retaliation for exercising rights under the Act. The Rehabilitation Act requires that agencies make reasonable accommodations to the known physical or mental limitations of a qualified disabled applicant or employee unless the agency can demonstrate that the accommodations would impose an undue hardship on the operation of its program.

#### 3. Age Discrimination in Employment Act of 1967, as amended (ADEA)

The ADEA prohibits discrimination in employment on the basis of age (40 years or older). It also prohibits retaliation against individuals exercising their rights under the statute. Unlike Title VII and the Rehabilitation Act, the ADEA allows persons claiming age discrimination to go directly to court without going through an agency's administrative complaint procedures. If, however, a complainant chooses to file an administrative complaint, he/she must exhaust administrative remedies before proceeding to court. As with Title VII complaints, a complainant exhausts administrative remedies 180 days after filing a formal complaint or 180 days after filing an appeal with the EEOC if the EEOC has not issued a decision.

#### 4. Fair Labor Standards Act of 1938, as amended (Equal Pay Act of 1963) (EPA)

The EPA prohibits sex-based wage discrimination. It prohibits Federal agencies from paying employees of one sex lower wages than those of the opposite sex for performing substantially equal work. Substantially equal work means that the jobs require equal skills, effort, and responsibility, and that the jobs are performed under similar working conditions. It also prohibits retaliation for exercising rights under the Act.

## **5. EEOC Regulation and Policy Directive**

The EEOC has issued regulations that address the application of Federal nondiscrimination law to the Federal government. The regulations governing the processing of Federal sector discrimination complaints are contained in Title 29, Code of Federal Regulations (CFR) Part 1614 and the policy directive is Management Directive 110.

### **1.2 EEO Director – Independent Authority and Reporting Relationships**

Agencies must avoid conflicts of position or conflicts of interest as well as the appearance of such conflicts. For example, the same agency official(s) responsible for executing and advising on personnel actions may not also be responsible for managing, advising or overseeing the EEO pre-complaint or complaint processes. Those processes often challenge the motivations and impacts of personnel actions and decisions. In order to maintain the integrity of the EEO investigative and decision making processes, those functions must be kept separate from the personnel function.

Heads of agencies must not permit intrusion on the investigations and deliberations of EEO complaints by agency representatives and offices responsible for defending the agency against EEO complaints.

### **1.3 Delegation of Authority to Resolve Disputes**

The agency must designate an individual to attend settlement discussions convened by an EEOC Administrative Judge or to participate in Alternative Dispute Resolution (ADR) attempts. Agencies should include an official with settlement authority at all ADR meetings. The probability of achieving resolution of a dispute improves significantly if the designated agency official has the authority to agree immediately to a resolution reached between the parties. If an official with settlement authority is not present at the settlement or ADR negotiations, such official must be immediately accessible to the agency representative during settlement discussions or ADR.

### **1.4 EEO Officials Cannot Serve as Representatives**

EEO officials must have the confidence of the agency and its employees. It is inconsistent with their neutral roles for EEO Counselors, EEO Investigators, EEO Officers, and EEO Program Managers to serve as representatives for agencies or complainants. Therefore, persons in these positions cannot serve as representatives for complainants or for agencies in connection with the processing of discrimination complaints.

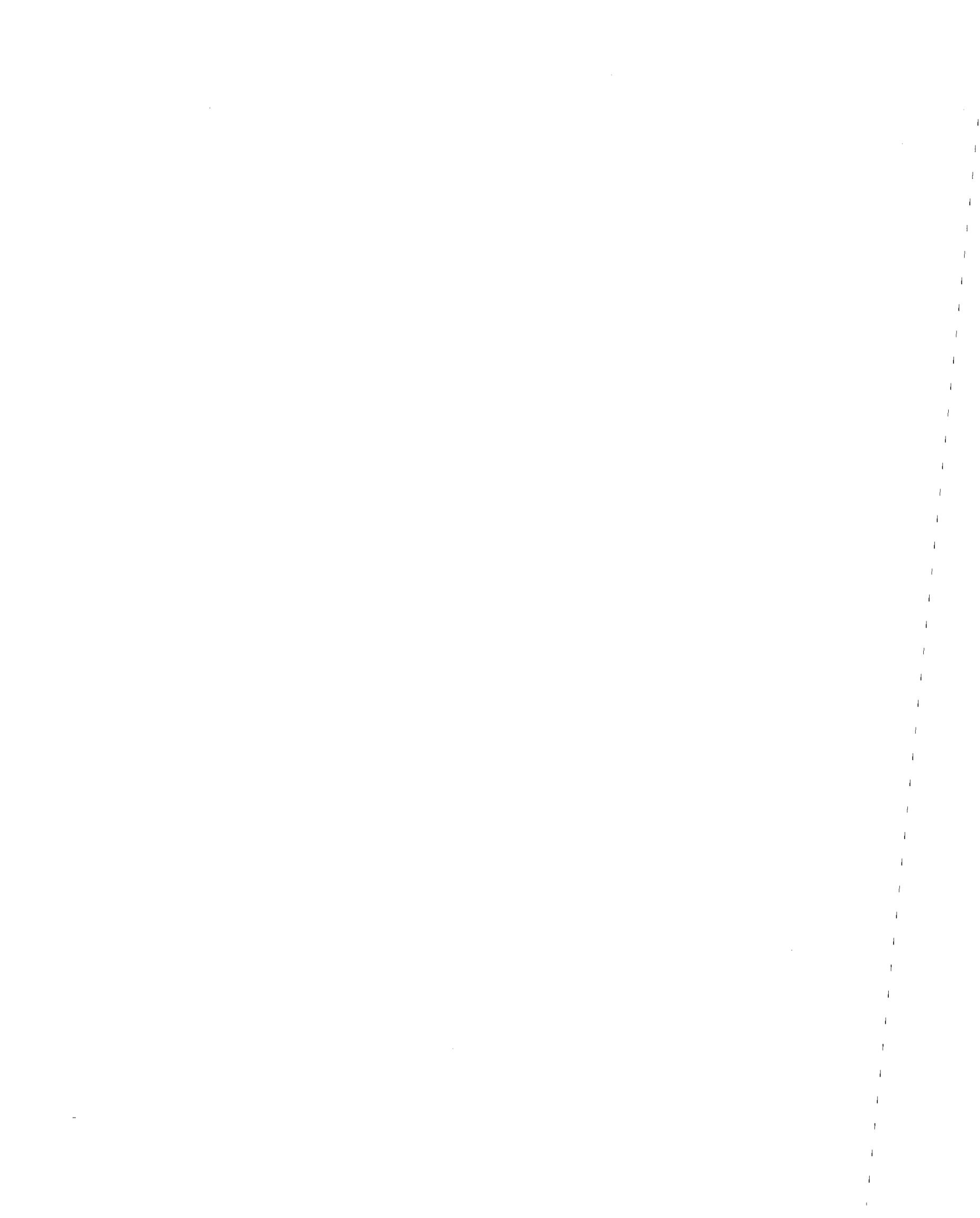
### **1.5 Management Officials' Rights and Responsibilities**

#### **A. Rights**

- The right to seek guidance from the legal staff;
- The right to know what the allegations are;
- May **not** have the right to know the identity of the Aggrieved Person during the EEO counseling process;
- The right to name witnesses to be interviewed during the formal process; and,
- The right to contact the FHWA Office of Civil Rights for technical assistance.

## **B. Responsibilities**

- Cooperate fully throughout the EEO complaint process;
- May decline mediation, but **must** cooperate fully during the EEO counseling process and the formal investigative process;
- Resolve the matter if possible;
- Allow official time for employees to seek assistance through the EEO complaint process;
- Allow EEO Counselors assigned to your office the time necessary to conduct EEO counseling sessions;
- Provide requested data to investigators; and
- Ensure the work environment is free of coercion, interference or fear of retaliation for involvement in the EEO complaint process.



# CHAPTER 2

## EQUAL EMPLOYMENT OPPORTUNITY PRE-COMPLAINT PROCESSING

### 2.1 Introduction

#### A. Counseling Generally

The Aggrieved Person starts the EEO complaint process by meeting with an EEO Counselor. The EEO Counselor plays a vital role in ensuring prompt and efficient processing of the formal complaint.

#### B. ADR and EEO Counseling

Both ADR and EEO counseling are essential to achieving early resolution of the claim. The opportunity for informal resolution is important. The ADR provides a means of improving the efficiency of the Federal EEO complaint process by attempting early informal resolution of EEO disputes.

#### C. Time Frames

All days noted below refer to calendar days.

<b>Number of Days</b>	<b>Action</b>
45 Days	Aggrieved Person has 45 days from the date of the alleged discriminatory act, or in the case of a personnel action, within 45 days of the effective date of the action to contact an EEO Counselor.
30 Days	The EEO Counselor must attempt resolution within 30 days of contact by the Aggrieved Person.
60 Days	Counseling can be extended for an additional 60 days if the Aggrieved Person agrees in writing to the extension. The FHWA Office of Civil Rights must approve the request. The total counseling period shall not exceed 90 days.
15 Days	Aggrieved Person has 15 days to file a formal complaint after receipt of the Notice of Right to File a Discrimination Complaint from the EEO Counselor.
90 Days	Where the Aggrieved Person chooses to participate in the ADR process, the pre-complaint processing period shall be 90 days.

## **2.2 The EEO Counseling Process**

### **A. The Roles and Responsibilities of an EEO Counselor**

Where an Aggrieved Person seeks EEO counseling, the EEO Counselor must ensure that the Aggrieved Person understands his/her rights and responsibilities in the EEO complaint process, including the option to elect ADR. The EEO Counselor must perform several tasks in **all** cases, regardless of whether the individual ultimately elects the ADR option, including:

1. Advise the Aggrieved Person about the EEO complaint process. The EEO Counselor should explain the agency ADR program, indicating either that the program is available to the Aggrieved Person or that the EEO Counselor will advise the individual whether the program will be made available. The EEO Counselor should further explain that if the ADR program is available, the Aggrieved Person will have to exercise an election option, and decide whether to seek pre-complaint resolution through the ADR process or through the traditional EEO counseling process. In this regard, the EEO Counselor should inform the Aggrieved Person about the differences between the two processes.
2. Determine the claim(s) and basis(es) raised by the potential complaint.
3. Conduct an inquiry during the initial interview with the Aggrieved Person for the purposes of determining jurisdictional questions. It includes obtaining enough information concerning the claim(s) and basis(es) so as to enable the Departmental Office of Civil Rights to properly identify the legal claim raised if the individual files a complaint at the conclusion of the EEO counseling process.
4. Seek a resolution of the dispute at the lowest possible level, unless the Aggrieved Person elects to participate in the agency's ADR program where the agency agrees to offer ADR in a particular case. If the dispute is resolved in counseling, the EEO Counselor must document the resolution.
5. Advise the Aggrieved Person of his/her right to file a formal discrimination complaint if attempts to resolve the dispute through EEO counseling or ADR fail to resolve the dispute.
6. Prepare a report sufficient to document that the EEO Counselor undertook the required counseling actions and to resolve any jurisdictional questions that arise.

### **B. When the Basis(es) is not Covered by the EEO Regulations**

If it is clear that the Aggrieved Person's problem does not involve a basis(es) covered by the regulations, the EEO Counselor should inform the Aggrieved Person and, if possible, refer him/her to an appropriate source. If the Aggrieved Person insists that he/she wants to file a discrimination complaint, the EEO Counselor should issue the notice of final interview. Under no circumstance should the EEO Counselor attempt to dissuade a person from filing a complaint.

## **2.3 Procedures Upon Initiation of EEO Counseling**

### **A. Seeking Resolution**

In almost all instances, informal resolution, freely arrived at by all parties involved in the dispute, is the best outcome of a counseling action. In seeking resolution, the EEO Counselor must listen to and understand the viewpoint of both parties so that he/she is able to assist the parties in achieving resolution. The EEO Counselor's role is to facilitate resolution, **not** develop or advocate specific terms of an agreement. The EEO Counselor must be careful not to inject his/her views on settlement negotiations.

### **B. Resolution**

#### **1. Resolution of the Dispute**

If during the course of the EEO Counselor's limited inquiry, the agency and the Aggrieved Person agree to an informal resolution of the dispute, the terms of the resolution should be reduced to writing and signed by both parties to help ensure that the agency and the Aggrieved Person have the same understanding of the terms of the resolution.

#### **2. Failure to Resolve the Dispute**

If an informal resolution is not possible, the EEO Counselor must hold a final interview with the Aggrieved Person within 30 days of the date the Aggrieved Person brought the dispute to the EEO Counselor's attention, unless the Aggrieved Person consented to an extension of time, not to exceed 60 days. If the dispute is not resolved at the end of the extended time period, the EEO Counselor must advise the Aggrieved Person in writing of his/her right to file a complaint.

### **C. Confidentiality of Negotiations for Resolution or ADR**

In order to facilitate resolution attempts, all parties involved in the resolution must be free to explore all avenues of relief. Offers and statements made by parties cannot be used against either party if resolution attempts fail. The EEO Counselor will not report **any** discussions that occur during negotiations for resolution.

## **2.4 Counseling Class Action Complaints**

Occasionally, an EEO Counselor may need to provide EEO counseling to an Aggrieved Person or group of individuals seeking to represent a class of persons. A class is defined as a group of employees, former employees, or applicants who alleged that they have been or are being adversely affected by an agency personnel policy or practice that discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, disability, retaliation or sexual orientation.

The EEO counseling requirements for class claims are the same as those for individual claims of discrimination.



# CHAPTER 3

## ALTERNATIVE DISPUTE RESOLUTION (ADR)

### 3.1 Introduction

The EEOC requires agencies to establish or make available an ADR program. The ADR program must be available during both the pre-complaint process and the formal complaint process.

The ADR offers the parties the opportunity for an early, informal resolution of disputes in a mutually satisfactory fashion. The ADR usually costs less and uses fewer resources than do traditional administrative or adjudicative processes, particularly processes that include a hearing or litigation. Early resolution of disputes through ADR can make agency resources available for mission-related programs and activities. The agency can avoid costs such as court reporters and expert witnesses. In addition, employee morale can be enhanced when agency management is viewed as open-minded and cooperative in seeking to resolve disputes through ADR.

### 3.2 ADR Techniques and Definitions

The EEOC's regulation requires that all agencies establish or make available an ADR program for the EEO complaint process. Numerous ADR techniques are available for use by agencies in their program. All agencies should be familiar with the following terms and techniques utilized by ADR professionals.

#### A. ADR

ADR is a term used to describe a variety of approaches to resolving conflict rather than traditional adjudicatory methods or adversarial methods. Examples of traditional adjudicatory methods include litigation, hearings, and agency administrative processing and appeals.

#### B. Mediation

Mediation is presently the most popular form of ADR in use by agencies in employment related disputes. Mediation is the intervention in a dispute or negotiation of an acceptable, impartial and neutral third party, who has no decision-making authority. The objective of this intervention is to assist the parties to voluntarily reach an acceptable resolution of the issues in dispute.

A mediator, like a facilitator, makes primarily procedural suggestions regarding how parties can reach an agreement. Occasionally, a mediator may suggest some substantive options as a means of encouraging the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individually, in caucuses, to explore acceptable resolution options or to develop proposals that might move the parties closer to a resolution.

### **3.3 Time Frames**

Where an agency has an established dispute resolution procedure and the Aggrieved Person agrees to participate in the procedure, the pre-complaint processing period shall be ninety (90) days. This time frame must be met to be consistent with the regulation.

If the dispute is not resolved in this time frame, the Aggrieved Person must be advised of the right to file a formal complaint.

### **3.4 Representation of the Parties**

Aggrieved Persons have the right to representation throughout the complaint process, including during any ADR process. While the purpose of ADR is to allow the parties to fashion their own resolution to a dispute, it is important that any agency dispute resolution procedure provide all parties the opportunity to bring a representative to the ADR forum if they desire to do so.

### **3.5 ADR Throughout the EEO Complaint Process**

Unless the agency has determined that a particular case is inappropriate for ADR, the agency must offer ADR at all stages of the EEO complaint process: counseling, after filing a formal complaint and prior to a hearing. The EEOC also suggests that agencies actively encourage the parties, particularly management, to continue attempting to resolve disputes throughout the EEO complaint process, whether through ADR or any other means of informal settlement.

### **3.6 Procedures When Mediation is Requested**

#### **A. General Information**

1. An Aggrieved Person may elect mediation over traditional EEO counseling.
2. An Aggrieved Person or management official may request mediation.
3. Both parties must agree to accept mediation.
4. Either party may decline mediation.

#### **B. Time Frame**

When mediation is approved at the pre-complaint stage, the mediation process will be **90 days** from the date the Aggrieved Person requested EEO counseling.

#### **C. Processing a Mediation Request Made by an Aggrieved Person**

1. The FHWA Office of Civil Rights will process all mediation requests.
2. The FHWA Office of Civil Rights will contact the appropriate management officials regarding the mediation process.
3. The FHWA Office of Civil Rights will provide management officials with a detailed explanation of the process by phone or in person.

4. Management officials will be provided with all necessary information regarding the mediation process. The documents for management officials include the following:
  - Mediation Brochure
  - Memorandum
  - Mediation Option Form
5. Management officials will be required to return the signed documents within five calendar days of receipt.
6. The FHWA Office of Civil Rights will advise the Aggrieved Person of the management officials' decision regarding mediation.
7. If the management officials accept the offer to mediate, the mediation session will be scheduled.
8. If the management officials decline the offer to mediate, the matter will be referred back to the EEO Counselor for processing under the EEO counseling process.
9. If the management officials and the Aggrieved Person reach an agreement, a written Settlement Agreement will be developed.

**D. Successful resolution**

The EEO Counselor shall advise the Aggrieved Person that if the dispute is resolved during the ADR process, the terms of the agreement must be in writing and signed by both the Aggrieved Person and the agency.

**E. Unsuccessful Resolution**

The EEO Counselor shall advise the Aggrieved Person that if the matter concludes without a resolution under the ADR program, or if the matter has not been resolved ninety (90) days from the contact with the EEO Counselor, the Aggrieved Person will receive a final interview and have the right to file a formal complaint.

Nothing said or done during attempts to resolve the complaint through ADR, including the failure by the agency to provide a neutral mediator, can be made the subject of an EEO complaint.

The EEO Counselor should have no further involvement in resolving the matter until he or she is advised of the outcome of the ADR process.

**F. If Mediation is not Chosen**

The EEO Counselor must advise the Aggrieved Person that if he/she does not choose to participate in the agency's ADR program, the dispute(s) about which he/she contacted the EEO Counselor will be handled through the agency's traditional EEO counseling procedures.



# CHAPTER 4

## PROCEDURES FOR RELATED PROCESSES

### 4.1 Mixed Case Complaints And Appeals

#### A. Definitions

A "mixed case complaint" is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age, disability, or reprisal related to or stemming from an action that may be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only a claim of employment discrimination or it may contain additional non-discrimination claims that the MSPB has jurisdiction to address.

A "mixed case appeal" is an appeal filed directly with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, or reprisal. There is no right to a hearing before an EEOC Administrative Judge on a mixed case complaint.

#### B. Procedures

The EEOC regulations provide for processing discrimination complaints on claims that are otherwise appealable to the MSPB. Two determinations must be made to decide if the mixed case regulations apply. First, the employee must have standing to file such an appeal with the MSPB. Second, the claim that forms the basis of the discrimination complaint must be appealable to the MSPB.

##### 1. Standing

- a. The following employees generally have a right to appeal to the MSPB and, therefore, to initiate a mixed case complaint or appeal:
  - (1) competitive service employees not serving a probationary or trial period under an initial appointment;
  - (2) career appointees to the Senior Executive Service;
  - (3) non-competitive service veterans preference eligible employees with one or more years of current continuous service (e.g., postal employees and attorneys with veterans preference); and
  - (4) non-preference eligible excepted service employees who have completed their probationary period or with two or more years of current continuous service (e.g., attorneys).
- b. The following employees generally do not have a right to appeal to the MSPB:
  - (1) probationary employees;
  - (2) certain non-appropriated fund activity employees;

- (3) employees serving under a temporary appointment limited to one year or less; and
- (4) employees of the Central Intelligence Agency, the General Accounting Office, the United States Postal Service, the Postal Rate Commission, the Panama Canal Commission, the Tennessee Valley Authority, and the Federal Bureau of Investigation.

2. Appealable Actions

a. Most appealable actions fall into the following six categories:

- (1) reduction in grade or removal for unacceptable performance;
- (2) removal, reduction in grade or pay, suspension for more than fourteen (14) days, or furlough for thirty (30) days or less for cause that will promote the efficiency of the service;
- (3) separation, reduction in grade, or furlough for more than 30 days, when the action was effected because of a reduction-in-force;
- (4) reduction-in-force action affecting a career appointee in the Senior Executive Service;
- (5) reconsideration decision sustaining a negative determination of competence for a general schedule employee; and
- (6) disqualification of an employee or applicant because of a suitability determination.

3. Election to Proceed is Required

- a. The regulations provide that a covered individual may raise claims of discrimination in a mixed case either as a direct appeal to the MSPB or as a mixed case EEO complaint with the agency, **but not both**.
- b. Whatever action the individual files first is considered an election to proceed in that forum. Filing a formal EEO complaint constitutes an election to proceed in the EEO forum. Contacting an EEO Counselor or receiving EEO counseling does **not** constitute an election.
- c. Where an Aggrieved Person files an MSPB appeal and timely seeks counseling, counseling may continue at the option of the parties.

4. Processing Mixed Case Complaints Filed at the Agency

- a. If an employee elects to file a mixed case complaint, the agency must process the complaint in the same manner as it would any other discrimination complaint.

# CHAPTER 5

## DEPARTMENTAL OFFICE OF CIVIL RIGHTS' (DOCR) PROCESSING OF FORMAL COMPLAINTS

### 5.1 Acknowledgement of Formal Complaints

Immediately upon receipt of a formal complaint of discrimination, the DOCR will acknowledge receipt of the complaint in writing.

The DOCR will send the complainant an acceptance letter stating the claims accepted for investigation. A copy of the acceptance letter is provided to the FHWA Office of Civil Rights. The FHWA Office of Civil Rights provides a copy of the letter to the servicing Headquarters or field office attorney. The DOCR assigns a contractor or DOCR staff investigator to investigate the complaint. The EEO Investigator will contact the FHWA Office of Civil Rights to determine the responsible management official in the program office named in the dispute. The management official should identify a staff member to work with the EEO Investigator. The staff member will be responsible for assisting the EEO Investigator with scheduling interviews and meetings and obtaining documentation.

### 5.2 Providing Other Information and Notice of Rights

#### A. The DOCR Shall Inform the Complainant of the Agency's Obligations

##### 1. To Investigate in a Timely Manner

The DOCR is required to investigate the complaint in a timely manner. The investigation must be appropriate, impartial, and completed within **180 days** of filing the complaint unless the parties agree in writing to extend the time period.

An investigation is deemed completed when the report of the investigation is served on the complainant in conjunction with the notice of the right to elect either a hearing before an EEOC Administrative Judge or a final decision<sup>2</sup> from the DOCR.

##### 2. To Process Mixed Cases in a Timely Manner

With regard to mixed case complaints, if a final decision<sup>2</sup> is not issued on a mixed case complaint within **120 days** of the date of filing, the complainant may appeal to the MSPB at any time thereafter or file a civil action but not both. The complainant is not entitled to a hearing before the EEOC on a mixed case.

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<sup>2</sup> Final decision or final action refers to the DOCR's issuance of a Final Agency Decision or a dismissal of the complaint.

## **B. The DOCR Shall Inform Complainant of His/Her Rights**

### 1. The Right to Hearing

Except in mixed cases, the complainant has the right to request a hearing before an EEOC Administrative Judge after **180 calendar days** from the filing of a formal complaint or after completion of the investigation, whichever comes first. Complainants must request a hearing directly from the EEOC field office that has jurisdiction over the geographic area in which the complaint arose.

### 2. The Right to Appeal

The complainant has the right to appeal a dismissal, final action or a decision.

- a. The DOCR will inform the complainant that he/she may appeal within **thirty (30) days** of receipt of the dismissal, final action or decision.

### 3. The Right to File a Civil Action

The complainant has the right to file a civil action in Federal district court on claims raised in the administrative process:

- a. Within **ninety (90) days** of receipt of a final action on an individual or class complaint if no appeal has been filed;
- b. After **180 days** from the date of filing an individual or class complaint if an appeal has not been filed and a final action has not been taken;
- c. Within **90 days** of receipt of the EEOC's final decision on appeal; or
- d. After **180 days** from the date of the filing of an appeal with the EEOC if there has been no final decision by the EEOC.

## **5.3 Conducting the Investigation**

### **A. The DOCR Retains Responsibility**

The DOCR is responsible for conducting an appropriate investigation of complaints.

### **B. What Must be Done for an Investigation to be Considered Appropriate**

A timely completed investigation means that within the applicable time period, the agency must complete the following actions:

1. The complaint must be appropriately investigated and include an appropriate factual record that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.
2. Copies of the investigative file, including a summary of the investigation, must be provided to the complainant(s).
3. Within **thirty (30) days**, notice must be given to the complainant informing him/her of his/her right to request a hearing—if it is not a mixed case—or of the right to request a final action by the DOCR.

#### **5.4 Final Actions After the Investigation**

After the investigation is completed, the complainant may request a hearing before an Administrative Judge or request a Final Agency Decision based on the merits of each claim in the complaint; or, as appropriate, the rationale for dismissing any claims in the complaint.



# CHAPTER 6

## DEVELOPMENT OF IMPARTIAL AND APPROPRIATE FACTUAL RECORDS

### 6.1 Responsibilities of the EEO Investigator

The EEO Investigator is a person officially designated and authorized to conduct inquiries into claims raised in EEO complaints. The EEO Investigator's responsibilities include the authority to administer oaths and to require employees to furnish testimony under oath or affirmation without a promise of confidentiality. The EEO Investigator does not make or recommend a finding of discrimination.

### 6.2 The Investigation

An investigation of a formal complaint of discrimination is an official review or inquiry, by persons authorized to conduct such review or inquiry, into claims raised in an EEO complaint. A copy of the complaint shall be provided to the EEO Investigator prior to the commencement of the investigation. The investigative process is non-adversarial. The EEO Investigator is obligated to collect evidence regardless of the parties' positions with respect to the items of evidence.

#### A. Purpose of the Investigation

The purpose of the investigation is: (1) to gather facts upon which a reasonable fact finder may draw conclusions as to whether an agency—subject to coverage under the statutes that the EEOC enforces in the Federal sector—has violated a provision of any of those statutes; and (2) if a violation is found, to have a sufficient factual basis from which to fashion an appropriate remedy.

#### B. Methods of Investigation

Investigative inquiries may be made using a variety of fact-finding models, such as the interview or the fact-finding conference; and a variety of devices, such as requests for information, position statements, exchange of letters or memoranda, interrogatories, and affidavits.

#### C. General Investigative Requirements

The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the complainant's group as compared with the treatment of other similarly situated employees, if any; and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant.

### 6.3 The Role of the EEO Investigator

#### A. Collecting and Discovering Factual Information

The role of the EEO Investigator is to collect and to discover factual information concerning the claim(s) in the complaint under investigation and to prepare an investigative summary.

## **B. Variety of Methods Available**

The EEO Investigator may accomplish his/her mission in a variety of ways, such as:

1. a presiding official at a fact-finding conference;
2. an examiner responsible for developing material evidence;
3. an issuer of requests for information in the form of requests for the production of documents, interrogatories, and affidavits; and/or,
4. a face-to-face interviewer in on-site visits.

## **C. EEO Investigator Must Be Unbiased and Objective**

In whatever the mix of fact-finding activity selected for a particular case, the EEO Investigator must be and must maintain the appearance of being unbiased, objective, and thorough. He/she must be neutral in his/her approach to factual development. The EEO Investigator is not an advocate for any of the parties or interests and should refrain from developing allegiances to them.

## **6.4 Witnesses and Representatives in the Federal EEO Complaint Process**

### **A. Official Time**

Complainants are entitled to a representative of their choice during pre-complaint counseling and at all stages of the EEO complaint process. Both the complainant and the representative, if they are employees of the agency where the complaint arose and was filed, are entitled to a reasonable amount of official time to present the complaint and to respond to agency requests for information.

Former employees of an agency who initiate the EEO complaint process concerning an adverse action relating to their prior employment with the agency are considered employees, and their representatives, if they are currently employed by the agency, are entitled to official time.

*Witnesses who are Federal employees, regardless of whether they are employed by the respondent agency or some other Federal agency, shall be in a duty status when their presence is authorized or required by the EEOC or agency officials in connection with the complaint.*

#### **1. Reasonable Amount of Official Time**

"Reasonable" is defined as whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information.

The actual number of hours to which the complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis. The complainant and the agency should arrive at a mutual understanding as to the amount of official time to be used prior to the complainant's use of such time. Time spent commuting to and from home should not be included in official time computations because all employees are required to commute to and from their Federal employment on their own time.

## 2. Meeting and Hearing Time

Most of the time spent by complainants and their representatives during the processing of a typical complaint is spent in meetings and hearings with agency officials or with EEOC Administrative Judges. Whatever time is spent in such meetings and hearings is automatically deemed reasonable. Both the complainant and the representative are to be granted official time for the duration of such meetings or hearings and are in a duty status regardless of their tour of duty. If a complainant or representative has already worked a full week and must attend a hearing or meeting on an off day, that complainant or representative is entitled to official time, which may require that the agency pay overtime.

## 3. Preparation Time

Since presentation of a complaint involves preparation for meetings and hearings—as well as attendance at such meetings, conferences, and hearings—complainants and their representatives are also afforded a reasonable amount of official time, as defined above, to prepare for meetings and hearings. They are also to be afforded a reasonable amount of official time to prepare the formal complaint and any appeals that may be filed with the EEOC, even though no meetings or hearings are involved. However, because investigations are conducted by agency or EEOC personnel, the regulation does not envision large amounts of official time for preparation purposes. Consequently, "reasonable," with respect to preparation time (as opposed to time actually spent in meetings and hearings), is generally defined in terms of hours, not in terms of days, weeks, or months. Again, what is reasonable depends on the individual circumstances of each complaint.

## 4. Aggregate Time Spent on EEO Matters

The EEOC considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. Therefore, an agency may restrict the overall hours of official time afforded to a representative, for both preparation purposes and for attendance at meetings and hearings, to a certain percentage of that representative's duty hours in any given month, quarter, or year. Such overall restrictions would depend on the nature of the position occupied by the representative, the relationship of that position to the mission of the agency, and the degree of hardship imposed on the mission of the agency by the representative's absence from his/her normal duties. The amount of official time to be afforded to an employee for representational activities will vary with the circumstances.

Moreover, the EEOC's regulation provides that in cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the EEOC or the agency may, after giving the representative an opportunity to respond, disqualify the representative. At all times, the complainant is responsible for proceeding with the complaint, regardless of whether he/she has a designated representative.

The EEOC does not require agencies to provide official time to employee representatives who are representing complainants in cases against other Federal agencies. However, the EEOC encourages agencies to provide such official time.

## 5. Requesting Official Time

The agency must establish a process for deciding how much official time it will provide a complainant. Agencies further must inform complainants, their representatives, and others who may need official time, such as witnesses, of the process and how to claim or request official time.

## 6. Denial of Official Time

If the agency denies a request for official time, either in whole or in part, the agency must include a written statement in the complaint file noting the reason(s) for the denial. If the agency's denial of official time is made before the complaint is filed, the agency shall provide the complainant with a written explanation for the denial, which it will include in the complaint file if the complainant subsequently files a complaint.

### **B. Use of Government Property**

The complainant's or complainant's non-attorney representative's use of government property (copiers, telephones, word processors) must be authorized by the agency and must not cause undue disruption of agency operations.

## **6.5 Sanctions for Failure to Cooperate During the Investigation**

Agencies are required to develop an impartial and appropriate factual record upon which to make findings on the claim(s) raised in the written complaint. The EEOC Administrative Judge and the EEOC's Office of Federal Operations have the authority to issue sanctions against an agency for its failure to develop an impartial and appropriate factual record in appropriate circumstances.

Moreover, agencies and complainants each have a duty to cooperate with the EEO Investigator during the investigation. The complainant, as well as the agency, may be subject to sanction where it fails to comply with a request of the EEO Investigator for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses. The EEO Investigator shall make a note in the investigative file concerning the party's failure, without good cause shown, to comply and the decision-maker (EEOC Administrative Judge during the hearing process or the DOOCR where the complainant requests a Final Agency Decision) or the EEOC on appeal may, in appropriate circumstances:

1. draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
2. consider the matter(s) to which the requested information or testimony pertains to be established in favor of the opposing party;
3. exclude other evidence offered by the party failing to produce the requested information or witness;
4. issue a decision fully or partially in favor of the opposing party; or
5. take such other actions as it deems appropriate.

## **6.6 Offer of Resolution**

The EEOC encourages the resolution of complaints at all times during the EEO complaint process.

# CHAPTER 7

## HEARINGS

### 7.1 Introduction

The hearing is an adjudicatory proceeding that completes the process of developing a full and appropriate record. A hearing provides the parties with a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses. An Administrative Judge from the EEOC adjudicates claims of discrimination and issues decisions. Administrative Judge decisions, in non-class action cases, become the final action of the agency if the agency does not issue a final order within forty (40) days of receipt of the Administrative Judge's decision.

The FHWA and its management officials will be represented by the FHWA Office of Chief Counsel (HCC) and HCC will provide advice, information, and guidance related to the discovery process for any scheduled hearing.

### 7.2 The Role of the Administrative Judge

Once an Administrative Judge is appointed, the Administrative Judge has full responsibility for the adjudication of the complaint. The agency cannot dismiss a case that has been referred to the EEOC for a hearing.

#### A. Dismissal of Complaint by Administrative Judge

The Administrative Judge may dismiss complaints within his/her jurisdiction on his/her own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint.

#### B. Transmittal of the Decision and Hearing Record

At the conclusion of the hearing stage the Administrative Judge shall send to the parties copies of the record produced at the hearing stage of the process, including the transcript of the hearing, if any, as well as the decision.

The Administrative Judge may, when necessary, release the transcript prior to the issuance of the decision (e.g., when the transcript is needed to prepare a post-hearing brief or to prepare for a hearing on relief).

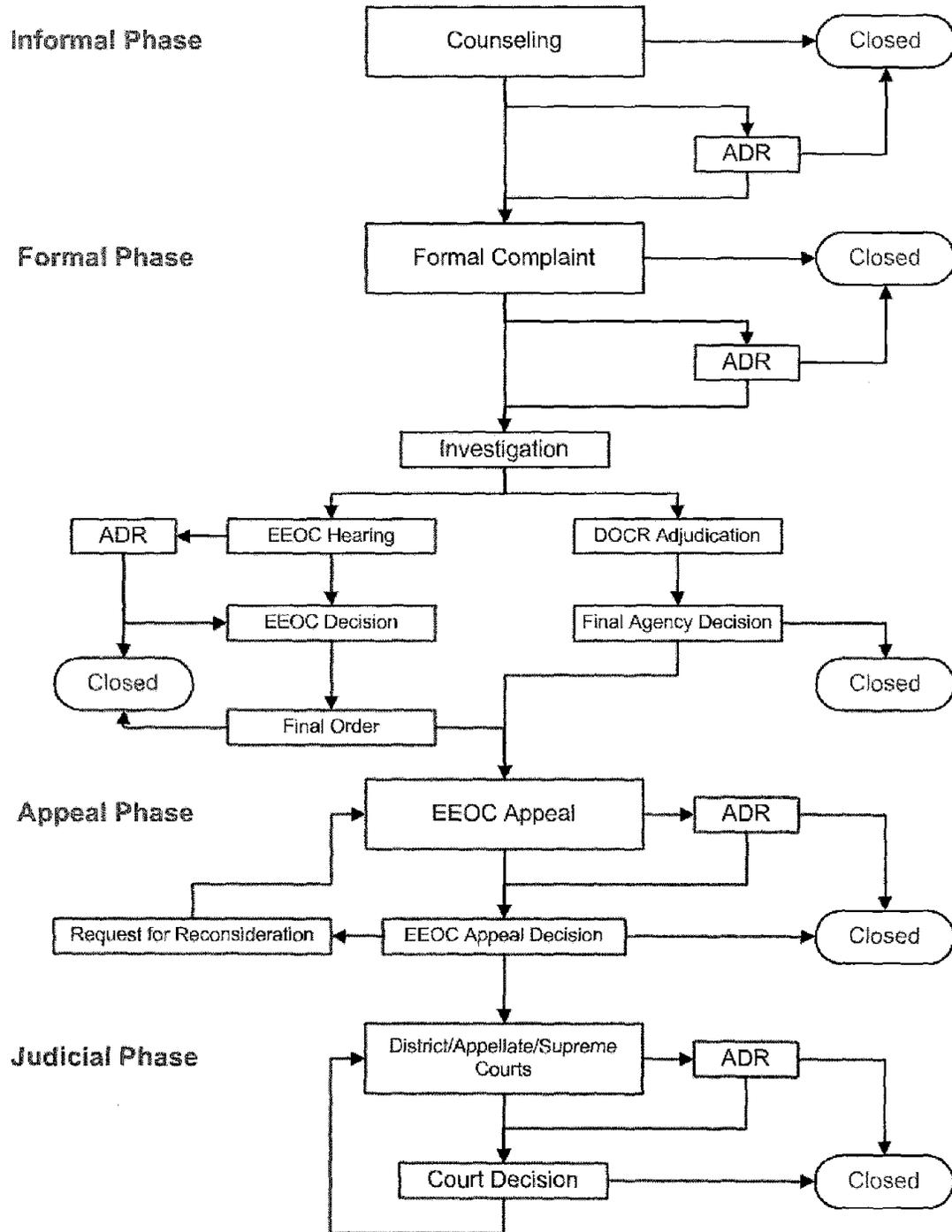
The Administrative Judge may issue a decision from the bench after the conclusion of the hearing, in lieu of issuing a written decision.

### 7.3 Exclusion and Disqualification

All participants in the EEO hearing process have a duty to maintain the decorum required for a fair and orderly proceeding and to obey orders of the Administrative Judge. Any person who engages in improper behavior or disorderly conduct at any time subsequent to the docketing of a complaint for a hearing is subject to sanction. Persons may be excluded from the hearing for disruptive conduct or misbehavior that obstructs the hearing. It further provides that if the complainant's or agency's representative engages in misconduct or refuses to obey an order of the Administrative Judge, the EEOC may suspend or disqualify the representative from future hearings, refer the matter to an appropriate licensing authority, or both.

# APPENDIX

## Simplified Flowchart for EEO Complaint Process



**NOTE: The flowchart was developed by DOCR.**



U.S. Department of Transportation  
Federal Highway Administration  
Headquarters, Office of Civil Rights,  
Investigations and Adjudications Unit  
Southeast Federal Center  
1200 New Jersey Avenue, SE  
HCR-40, Room E81-101  
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<http://www.fhwa.dot.gov/civilrights/index.htm>

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